

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Replacement of Part 90 by Part 88) PR Docket No. 92-235
 to Revise the Private Land Mobile)
 Radio Services and Modify the)
 Policies Governing Them.)

To: The Commission

Comments of Blooston, Mordkofsky, Jackson & Dickens

The communications law firm of Blooston, Mordkofsky, Jackson & Dickens ("BMJ&D") hereby submits, pursuant to Section 1.415(a) of the Commission's Rules, the following comments in response to the Commission's Notice of Proposed Rule Making, FCC 92-235, released November 6, 1992 ("NPRM") in the above-captioned proceeding, on behalf of the firm's clients who are licensees and applicants in the Private Land Mobile Radio Services.

I. The Commission Should Expand the Scope of this Proceeding to Consider Sources of Spectrum Other Than the Private Land Mobile Radio Services.

BMJ&D supports the Commission's goal of promoting spectrum efficiency to meet the expected communications needs for the future. However, BMJ&D believes that the Commission has unnecessarily focused on spectrum allocated to the rapidly expanding Private Land Mobile Radio Services ("PLMRS") as the sole source of relief, when it should look to free up spectrum allocated to the Federal Government and/or to the broadcast services, to at least partially ease the spectrum crunch for mobile service providers. Currently, the broadcast services are migrating to new technologies, such as AM-stereo and High Definition Television ("HDTV"). This migration appears to be the perfect opportunity to reexamine the bandwidth requirements and other technical

licensees share equally in making their operations spectrally efficient. Additionally, the Commission is currently in the process of acquiring additional unused spectrum from the Federal Government's allocation, and should explore further transfers of spectrum with the National Telecommunications and Information Administration.

Over the past decade, the number and uses of PLMRS facilities has increased at a phenomenal rate, while the amount of spectrum allocated to these services has essentially remained static. The PLMRS has been able to absorb these additional facilities primarily because frequencies below 470 MHz are assigned on a shared-use/best available channel basis so that even though

ambulance services in the case of life-safety emergencies; to communicate with highway department vehicles during snow removal and highway construction and repair projects, etc. PLMRS facilities are also used by emergency road services to assist stranded motorists and to coordinate the removal of disabled vehicles from the highways, especially on urban highways where a disabled vehicle can easily cause traffic to back-up for several miles, and by central station alarm companies to provide alarm services which protect the safety of life and property in the event of fire, burglary or other threats. Also important are the business uses of radio. PLMRS facilities are used in almost every facet of business, from manufacturing, to oil field production to local delivery services. If the Commission proceeds with its proposal to "squeeze" additional spectrum out of the PLMRS, BMJ&D fears that the increased costs, placed on the backs of the PLMRS licensees - many of whom are small businesses or state and local governments - could cause the fragile economic recovery to stall by significantly increasing the costs to operate these vital radio communications systems. Accordingly, BMJ&D recommends that the Commission first look to other sources, where spectrum may not be efficiently used, to recover spectrum for allocation to new radio services.

II. The Commission Should Not Eliminate Provisions Which Allow Private Radio Licensees to Contract for Compliance with Part 17 of the Commission's Rules, and Should Simplify the Ability of Licensees to Achieve Compliance.

Section 90.441(b) of the Commission's Rules currently authorizes licensees to designate, in writing, one licensee or non-licensed agent to be responsible for maintenance and inspection of the antenna tower and maintenance of the inspection log, so long as a copy of the agreement is kept in each licensee's station records. The Commission, however, has not proposed to retain Rule Section 90.441(b), in any form, in its replacement of Part 90

of its Rules by Part 88.

The current rule, which provides a mechanism for private land mobile licensees to employ the most effective available means for ensuring compliance with Part 17 of the Commission's Rules, by hiring entities experienced in radio operation and tower maintenance. These entities generally include tower owners, or large communications service companies like Motorola. BMJ&D is concerned that the loss of this provision will create an environment in which many private radio licensees, who rely on radio as a means for accomplishing their business activities, will not be able operate their radio facilities in a cost-effective manner.

Moreover, recent Field Operation Bureau interpretations of Section 90.441(b) have limited the effectiveness of this rule, by finding that a licensee can be fined even if it has responsibly contracted with a bona fide tower owner or other experienced entity, and a tower violation occurs which is the fault of the contractor. It is respectfully submitted that such approach ignores the realities of the marketplace, and placed an unwarranted burden on radio users that discourages the wider use of radio -- a primary purpose of the Communications Act. See 47 U.S.C. § 151. While BMJ&D certainly agree that tower safety is of the utmost importance, it is respectfully submitted that the current regulatory scheme does not effectively encourage tower compliance, because the negative incentive is placed on the wrong parties. Moreover, it discourages use of radio, especially by smaller entities, which has adverse safety implications in and of itself.

Accordingly, BMJ&D proposes a rule section entitled "Inspection and maintenance of tower obstruction markings and lighting." which would provide a mechanism to transfer primary responsibility for maintenance of an antenna

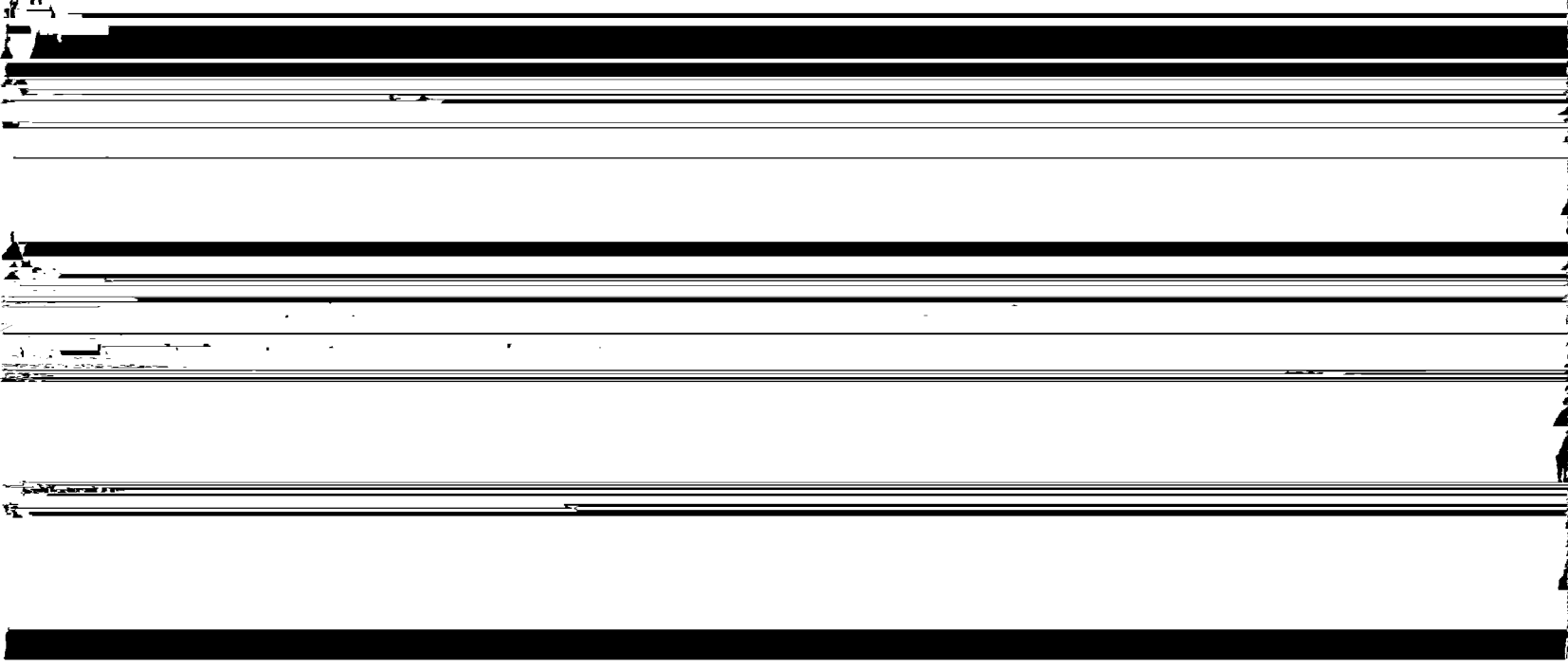

structure's required obstruction markings and/or lighting from the private radio licensee to another entity, provided that certain criteria are met. For the reasons discussed below, BMJ&D urges the Commission to reconsider, and adopt suggested Rule Section 88.____ (copy attached as Appendix I, hereto), which would allow licensees to transfer primary responsibility for compliance with Part 17 of the Commission's Rules to either the tower owner, a management agent for the tower owner, another licensee user on the tower, or the owner of a community repeater installed on the tower, if the licensee is authorized by the Commission to use such community repeater. This transfer of responsibility would provide the Commission with a means to effectively ensure tower compliance since the local FCC Field Office would have a copy of the agreement which identifies the antenna tower and the party with primary responsibility for ensuring compliance with obstruction marking and lighting requirements of Part 17 of the Commission's Rules.

A. Where a Licensee Enters Into a Bona Fide Contract, Tower Owners and Managers Should be Held Primarily Responsible for Ensuring that the Antenna Structure is Properly Obstruction Marked and Lighted.

BMJ&D urges the Commission to recognize the realities of the business world by holding tower owners, rather than individual licensee users (many of whom are small businesses), primarily responsible for compliance with its obstruction marking and lighting requirements. Today, many of our private radio clients use radio as a means to efficiently carry out their day-to-day business activities. However, because of the large investment that would be required to erect and maintain an individual antenna tower (which could amount to tens of thousands of dollars or more), many private radio licensees enter into rental agreements for tower space from persons in the business of leasing tower space. In this regard, many of our clients, in the belief that it would

ensure that their antenna towers were always in compliance with the Commission's Rules, use sites that are owned or managed by large communications companies, who have a good reputation and much experience in the communications industry.

Typically, because of the antenna tower owners' concerns for insurance liability, should a licensee or its agent have an accident while making a repair on the tower, most tower space rental agreements prohibit tenants from performing repairs or maintenance on the antenna towers, whether it be for general maintenance or maintenance related to repair of the antenna tower's obstruction marking and lighting. Rather, tower owners, in general, require that they be responsible for all aspects of tower maintenance and for ensuring



apparently recognized that the tower owners, and not the individual licensees, are truly the parties responsible for the condition of the antenna tower and the maintenance of the tower's obstruction marking and lighting.

B. The Suggested Rule Section Will Enhance the Commission's Enforcement Efforts to Ensure that Antenna Towers are Properly Obstruction Marked and Lighted.

BMJ&D believes that adoption of the attached suggested rule will enable the local Field Offices to better ensure prompt compliance with the Commission's obstruction marking and lighting standards. Specifically, suggested Section (b) (iii) provides that any licensee, who enters into a written agreement to transfer primary responsibility for ensuring that the antenna tower complies with the Commission's obstruction marking and lighting requirements, must provide a copy of the agreement, which identifies the antenna tower by street address and geographic coordinates, to the Engineer-in-Charge of the local Field Office. In this way, the field office staff, following an inspection, will be able to promptly determine the responsible party in order to ensure that any deficiencies are promptly corrected, rather than having to search its licensee data-base in order to locate an individual who is "physically" able to locate the responsible party to effect repairs to the antenna tower.

Should sanctions, such as monetary forfeitures be warranted, the agreement would also readily identify the primary party against whom such forfeitures should be assessed. In this regard, the agreement would also comply with Rule Section 1.80(d), to inform a non-licensee tower owner of his responsibilities for ensuring that the tower is properly obstruction marked

and lighted.¹ The licensee who has entered into the agreement would only be secondarily liable for a monetary forfeiture (i.e., no forfeiture would be assessed against the licensee) provided the following criteria are met:

(i) the licensee takes action to cure any deficiencies in the antenna structure's obstruction marking and lighting, as well as assure that the Federal Aviation Administration is promptly notified of any outage, as soon as it becomes aware, after due inquiry, that the entity has failed to carry out its contractual obligations; and

(ii) the licensee visually inspects the antenna structure once each year to ensure that it is properly obstruction marked and lighted, and places a written memorandum confirming such inspection in the permanent station file. Such memorandum, shall also be forwarded to the local FCC Field Office to be associated with the licensee's written-contractual arrangement already on file for the antenna tower.

However, a licensee who enters into the contractual arrangement, but does not have evidence to demonstrate compliance with the conditions listed above, would become jointly responsible with the tower owner and any other primary party, for ensuring that the antenna tower is properly obstruction marked and lighted, and in the event of an outage, that the Federal Aviation Administration is promptly notified. In this way, the Commission can be assured that its licensees take seriously the obligations to properly

¹ Since tower owners can be held liable for breach of contract arising out of tower violations, BMJ&D believes that the imposition of an \$8,000 monetary forfeiture against each licensee on the antenna tower places an unfair burden on the tower owner. It has been long established that the purpose of monetary forfeitures is not to punish, but to "obtain greater compliance by licensees with the terms of their licenses and the Commission's rules, and to deter non-compliance." Crowell-Collier Broadcasting Corp. 44

obstruction mark and light antenna towers in order to protect air navigation safety from undue hazards.

C. The Suggested Rule Section Clarifies the Commission's Standards for Determining When an Antenna Structure Has "Good Visibility" During Daylight Hours.

Suggested Section (b) (iv) (c) establishes certain standards that antenna towers must meet in order to be considered to have "good visibility" during daylight hours. Currently, the only guidance regarding obstruction markings is provided by Rule Section 17.50, which provides that antenna towers shall be cleaned or repainted as often as necessary to ensure "good visibility". Because the term "good visibility" is, by definition, subjective, BMJ&D believes that the Commission's Rules should contain objective criteria so that all licensees and primary parties will be able to determine when an antenna tower should be cleaned or repainted. The enumeration of these objective standards in suggested Section (b) (iv) (c) of the attached Rule will greatly assist licensees and other responsible parties in ensuring that antenna towers are clearly visible during daylight hours so that air-navigation safety is not compromised. The proposed rule would also be consistent with Congressional and Commission policies assisting small business entities, and encouraging the

The Commission should also retain provisions which allow PLMRS licensees, because of their unique nature in that most licensees are not in the communications business, to transfer primary responsibility to designated entities provided certain safeguards are met. In this regard, BMJ&D has prepared a suggested rule which it believes would provide sufficient safeguards so that the Commission could hold the designated entity, rather than the licensee, primarily responsible for compliance with the Commission's obstruction marking and lighting requirements. Additionally, BMJ&D urges the Commission to adopt the suggested objective criteria regarding antenna tower obstruction markings so that there can be certainty as to when an antenna tower has "good visibility".

Respectfully submitted,

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APPENDIX I

**Suggested Rule 88.____
Inspection and maintenance of tower
obstruction markings and lighting.**

Suggested Rule 88. ___ Inspection and maintenance of tower obstruction markings and lighting.

(a) The Licensee of any radio station with an antenna structure that must be painted and/or illuminated as specified in the station authorization is required to maintain the tower obstruction marking and lighting, and any associated control equipment in accordance with the requirements of Part 17 of this Chapter.

(b) The Licensee of any radio station, who leases space on an antenna structure that must be obstruction marked and/or lighted in accordance with Part 17 of this Chapter, may enter into an arm's-length contractual arrangement, which notifies the entity of its responsibilities in accordance with Rule Section 1.80(d) of this Chapter, to transfer primary responsibility for compliance with Part 17 of this Chapter if:

(i) The contractual arrangement is entered into with an entity that is:

(a) the tower owner;

(b) the tower owner's management agent;

(c) the owner of a community repeater installed on the antenna structure, if licensed to use such community repeater; or

(d) another licensee on the same antenna structure.

(ii) The contractual arrangement identifies the location of the antenna structure by street address (including city, county and state) and geographic coordinates; and lists the obstruction marking and lighting specifications, by reference to specific paragraph numbers on FCC Forms 715 and 715A, and any special conditions imposed on the license for obstruction marking and lighting. A copy of the FCC Forms 715 and 715A shall be attached to the agreement.

(iii) The contractual arrangement is reduced to writing and a copy is retained in the licensee's permanent station file and a copy is forwarded to the local FCC Engineer-in-Charge.

(iv) The contractual arrangement provides that the entity, in accordance with the provisions of Part 17 of this Chapter, shall:

(A) visually inspect the antenna structure's obstruction lighting or install a properly

maintained automatic alarm circuit, designed to detect a failure of the antenna structure's obstruction lights and provide an indication of such failure to the contracted entity;

(B) notify the nearest Flight Service Station of the Federal Aviation Administration of any light outage involving the antenna structure's top-

(vi) The contractual arrangement provides that the licensee shall:

(i) shall take action to cure any deficiencies in the antenna structure's obstruction marking and lighting, as well as assure that the Federal Aviation Administration is promptly notified of any outage, if it becomes aware, after due inquiry, that the entity has failed to carry out its contractual obligations; and

(ii) visually inspect the antenna structure once each year to ensure that it is properly obstruction marked and lighted, and place a written memorandum confirming such inspection visit in the permanent station file. Such memorandum shall be retained with the written-contractual arrangement.

(c) Any contractual arrangement complying with Subsection (b) of this Section, shall be sufficient to transfer from the licensee, primary responsibility for compliance with Part 17 of this Chapter, including liability for fines. The licensee shall, however, remain secondarily responsible, and may be the subject of Commission enforcement actions, if it is notified by the Commission that the contractor has failed to meet its obligations under Subsection (b) of this section, and the licensee fails to take corrective action within a reasonable time.